

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Harold Schneider, Lyle Regier and Eugene Harry also known as Gene Harry operating as
Fuel Management Systems International Inc.
("FMSII")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE N_{O.}: 1999/185

DATE OF H_EARING: July 14, 1999

DATE OF D_ECISION: July 28, 1999

DECISION

APPEARANCES

for Eugene (Gene) Harry	Craig Harrison
for the individuals	In person
for the Director	No one appearing

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Eugene (Gene) Harry (“Harry”) of a Determination that was issued on March 4, 1999 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Harry was one of three individuals operating an entity identified as Fuel Management Systems International Inc. (“FMSII”) and as such was an employer for the purposes of the Act and was responsible, along with two other individuals, Harold Schneider (“Schneider”) and Lyle Regier (“Regier”), for the unpaid wages of two former employees, Richard Tyrwhitt (“Tyrwhitt”) and Kenneth McCrory (“McCrory”). Regier has also appealed the Determination and his appeal has been addressed in BC EST #D314/99. I concluded in that appeal that Regier was not an employer for the purposes of the Act.

Harry says the Director was wrong to conclude that he was an employer for the purposes of the Act and, alternatively, if he was an employer the Director was wrong not to limit his liability for unpaid wages and vacation pay as laid out in Section 96(1) and (2) of the Act.

ISSUES TO BE DECIDED

The issue raised by the appeal is whether Harry has met the burden of persuading the Tribunal that the Determination ought to be varied or canceled because the Director erred in fact or in law in concluding that he was an employer for the purposes of the Act.

PRELIMINARY MATTER

Before addressing the substance of the appeal, I will outline a preliminary issue that was raised by Harry. On July 13, 1999, one day before the scheduled hearing, counsel for Harry applied to the Tribunal for an adjournment. Two reasons were identified in support of the requested adjournment. First, that Harry was having certain medical problems. A note from his physician was attached to the application. Second, that Schneider had accepted the liability for the claims of Tyrwhitt and McCrory but needed time to “come up with the payments”. The Tribunal refused to deal with the application on July 13 and deferred it to the commencement of the hearing on July 14, 1999. On that date, Harry did not appear, but Craig Harrison appeared on his behalf and made the application for adjournment. Based on information provided by Mr. Harrison, Harry was, at the time the application for adjournment was made, at work in Mr Harrison’s accounting office in Kelowna. Mr. Harrison presented the physician’s note, dated July 12, 1999 and a letter from Schneider, also dated July 12, 1999. It is worthwhile to set out the content of the physician’s note:

To Whom It May Concern:

Re: Eugene H. Harry

Mr. Harry suffers from numerous medical problems including diabetes, heart valve replacement, coronary disease and transient [unintelligible] attacks. His health has deteriorated under the stress he is currently under and I believe it appropriate for pending court proceedings of July 14/99 to be delayed as his health is at risk.

The physician did not attend the hearing to explain the basis for his belief.

The application for adjournment was denied and the hearing proceeded. Mr. Harrison communicated to Harry that the adjournment had been denied. Harry declined to attend the hearing, although Mr. Harrison was in contact with him by telephone on several occasions during the course of the hearing. Mr. Harrison also had some personal knowledge of the matters in dispute and of the affairs of Fuel Management and gave evidence.

FACTS

The Determination sets out the following Findings of Fact:

1. Fuel Systems marketed and sold diesel technology that DTS Diesel Tech Systems Inc. ("Diesel Tech") manufactured.
2. Fuel Management is not a registered company in the province of British Columbia. Diesel Tech is a registered company in the province of British Columbia (copy of the corporation search is attached).
3. On April 21, 1998, Eugene Harry signed an agreement stating he assumed the position of President and CEO of Fuel Management on April 20, 1998 (copy enclosed).
4. On August 7, 1998, Eugene Harry resigned as President and CEO of Fuel Management.
5. During a telephone conversation on February 11, 1999 Mr. Harry advised that while he was acting as President and CEO of Fuel Management he secured a bank loan for the company.
6. Eugene Harry acknowledges wages are owed to both complainants.
7. The wages that are outstanding to the two complainants were earned during the period Eugene Harry was acting as President and CEO of Fuel Management.
8. Harold Schneider and Lyle Regier are Directors and Officers of DTS Diesel Tech Systems Inc.
9. Harold Schneider acknowledges wages are owed to both complainants and that he is responsible for the payment of those wages
10. Harold Schneider terminated Kenneth McCrory on August 11, 1998 (copy of termination letter enclosed).

Based on the above findings of fact, the Determination makes out the following analysis:

Section 1 of the Act defines an employer as:

“employer” includes a person

- (a) who has or had control or direction of an employee, or*
- (b) who is responsible, directly or indirectly, for the employment of an employee*

The use of the word “includes” means that the definition is to be given a broad interpretation, and further, means that the definition itself is not exhaustive.

Harold Schneider and Lyle Regier approached Eugene Harry and offered him the position of President and CEO of Fuel Management and an agreement was signed to that effect on April 21, 1998. Prior to this agreement Harold Schneider and Lyle Regier were responsible for the daily operation of Fuel Management. Additionally, after Mr. Harry resigned as president it was Mr. Schneider that terminated Kenneth McCrory. I cannot find any evidence to indicate that at any time did Mr. Schneider or Mr. Regier cease their involvement in Fuel Management. In fact, Mr. Schneider acknowledges his indebtedness for payment of the outstanding wages.

The Determination concludes “from the above information” that “Fuel Management was operated” by Schneider, Regier and Harry.

The hearing of this appeal revealed the following additional facts:

1. It is not entirely correct to say the Fuel Management “marketed” diesel technology “developed” by Diesel Tech. While not a great deal turns on this point for the purposes of this appeal, Diesel Tech was set up as the provincial corporate vehicle through which a number of individuals, including Schneider and Regier, were developing an idea that would reduce fuel emissions from diesel burning engines. Fuel Management was intended to market and distribute any resulting technology that was produced by Diesel Tech. In the initial stages the function of Fuel Management included facilitating testing and approval of the idea from regulatory agencies and setting up a network of potential customers. The idea never got past the initial stages and by mid-August, 1998 the plan and the structure implemented to facilitate the plan had collapsed. During the relevant time there is no doubt the Diesel Tech and Fuel management were operationally and functionally integrated.
2. Fuel Management Systems International Inc. (“FMSII”) was, during the relevant time, a corporation registered in the State of Washington.
3. On April 21, 1998, Harry, Schneider and Regier signed an agreement under which Harry was to assume the position of President and CEO of FMSII. Essentially, the agreement was made to secure an investment of \$100,000.00 by Harry in the development of the diesel emission technology. On the evidence, I accept the submission of counsel for Harry that the position of President and CEO of FMSII was largely “ceremonial”. Many of the matters contemplated by that agreement were never completed.
3. Following the signing of the April 21, 1998 agreement, Harry and one other individual, Don Bergman, signed incorporation documents for a provincial company named FMSI Fuel Management Systems, Inc. That company was registered in the province on July 7, 1998 with Harry as a director and officer.
4. Although McCrory was paid wages from the accounts of several companies or entities, including FMSII, Fuel Management, Diesel Tech and its counterpart in the United States, Diesel Tech Systems, Inc., there was

only one company, Diesel Tech, that had a payroll account and all wages and deductions were recorded on that payroll.

6. Harry was in regular contact with both Tyrwhitt and McCrory. Tyrwhitt's office was located at Airport Square in Vancouver. Harry signed the lease for that office. Tyrwhitt and Harry communicated regularly about the business. McCrory's place of employment was an office in Rutland. Harry authorized and paid for renovations on that office and instructed McCrory to change his hours of work to be consistent with the hours of work in his office in Vernon. Harry controlled payment of salaries and expenses. He instructed Tyrwhitt and McCrory to accompany him on a trip to Calgary, Alberta and he made the decision to cut the trip short. Harry instructed McCrory to assemble some technical information for him to take on a sales trip to the United States.
7. There was evidence that Harry applied for, then canceled, a line of credit for Fuel Management.

ANALYSIS

The *Act* is remedial legislation and, as such, should be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects, see *Machtinger v. HOJ Industries Ltd.* (1992) 91 D.L.R. (4th) 491 (S.C.C.) and *Helping Hands v. Director of Employment Standards* (1995) 131 D.L.R. (4th) 336 (B.C.C.A.).

An analysis of the issue raised by this appeal must begin with the definition of "*employer*" in Section 1 of the *Act*

"employer" includes a person

- (a) who has or had control or direction of an employee, or
- (b) who is responsible, directly or indirectly, for the employment of an employee;

It is correctly noted in the Determination that the definition of "*employer*" in the *Act* is inclusive and while the definition is often criticized as being too open ended to be very useful, it is normally a simple matter to identify the employer. Some situations, however, require a more detailed analysis of the relationship and of the parties involved. In such cases, the Tribunal has adopted an approach that addresses the language and the purposes of the *Act*.

In this appeal, Mr. Harrington did not seriously challenge the evidence of Tyrwhitt and McCrory showing the day-to-day involvement Harry had with those employees. Indeed, there was a considerable body of evidence presented by Tyrwhitt and McCrory to counter the suggestion made by counsel for Harry in the appeal that Harry had no control or direction over those employees. Instead, the approach taken by Mr. Harrington was to suggest that his role in the management of the business, including the direction and control he exercised vis Tyrwhitt and McCrory, was simply that of an investor protecting his investment and not that of an employer. I do not accept this characterization of his involvement in the business of Fuel Management. It was apparent on the evidence that from the signing of the April 21 agreement Harry assumed a substantial role in the business, including control and direction of employees. And even if, as Mr. Harrington argued, the terms of the agreement were never completed, as a

matter of fact, from April 21 until the employment of the employees ended Harry acted as though the agreement had effect.

Harry's ability to direct McCrory to change his hours of work, to accompany him on a trip to Calgary and to instruct him to assemble technical data; his control over payment of expenses and wages and his ability to control and incur financial obligations for Fuel Management all militate against this appeal.

In respect of the argument that Harry's liability under the *Act*, in the event he is an employer, should be limited to those amount set out in subsections 96(1) and (2), there is no factual basis for this argument. Section 96 addresses the liability of a director or officer of a corporation for unpaid wages of the corporation's employees. Generally, that provision limits the personal liability of a director or officer to up to 2 months unpaid wages and does not impose any personally liability for vacation pay that becomes payable after the director or officer ceases to hold office.

The difficulty with this argument is that no legal "corporation" existed until July 7, 1998, so it does not address the identity of the employer before that date. Even if one accepts that the provincially incorporated company was an employer after July 7, the fact is that neither Tyrwhitt nor McCrory continued to be employed for more than two months after that date. However, there is nothing on the record or in the evidence to suggest there was any fundamental change in the identity of the employer caused by the incorporation of the provincial company, FMSI Fuel Management Systems, Inc. I do not accept that a non-legal entity, such as an unregistered extra-provincial corporation, can be an employer under the *Act* in its own name. The rationale for that conclusion lies in the enforcement process under the *Act*, which requires persons against whom legal processes can issue.

Finally, I do not accept that Harry's role in the business was no different than that of Tyrwhitt and McCrory. There is ample evidence to support the conclusion that Harry, along with Schneider, operated Fuel Management and that Tyrwhitt and McCrory took their direction from him after April 21.

The appeal is dismissed

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated March 4, 1999 be confirmed as against Harry, together with whatever interest has accrued since the date of issuance pursuant to Section 88 of the *Act*.

David Stevenson, Adjudicator